No. 92-166

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Keene Corporation,

Petitioner,

v.

United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 10, 1992

DEFENDERS OF PROPERTY RIGHTS

QUESTIONS PRESENTED

1. Whether the decision below violates both the plain language and the purpose of the Tucker Act.

2. Whether a jurisdictional statute which deprives a property owner of the right to seek just compensation whenever a suit for declaratory or equitable relief is filed violates the fifth amendment.

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Pursuant to Rule 37.3 of the Rules of this Court, Defenders of Property Rights submits this brief *amicus curiae*. The *amicus* supports reversal of the decision by the United States Court of Appeals for the Federal Circuit.

INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally-protected private property rights. The members of Defenders of Property Rights are property

owners and other beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal actions affecting the public interest and the private property rights of its members. Defenders of Property Rights engages in litigation around the nation on behalf of its members in defense of property interests protected against government incursion by the Bill of Rights. Because the Court of Federal Claims is the only court with jurisdiction to hear claims for just compensation against the federal government for the taking of private property, the interests of Defender's membership will be adversely affected if the decision below, which restricts the ability of the Court of Federal Claims to hear these claims, is not reversed.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case as presented by the Petitioner.

SUMMARY OF ARGUMENT

The just compensation clause of the fifth amendment contains the only express money damages remedy in the Constitution. Recognizing the unique nature of this explicit guarantee, that government will not take private property for public use without providing compensation to the owner for that taking, this Court has on more than one occasion rejected attempts to limit or curtail this clause. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court rejected the California rule which limited the property owner to a claim for invalidation for an unconstitutional taking, holding that "claims for just compensation are grounded" in and thus required by "the Constitution itself." *Id.* at 315. The *First English* Court explained that invalidation alone without just compensation is an inadequate remedy under the fifth amendment because "the Constitution . . . dictates the

remedy for interference with property rights amounting to a taking." *Id.* at 316 n. 9.

Moreover, this Court has also recognized that the explicit nature of the unconstitutional taking remedy is "self-executing" meaning that "statutory recognition [of the right to just compensation is] not necessary." *Jacobs v. United States*, 290 U.S. 13, 16 (1933). As explained by the *Jacobs* Court:

> The form of the remedy [does] not qualify the right. It rest[s] on the fifth amendment. . . . A promise to pay [is] not necessary. Such a promise [is] implied because of the duty to pay imposed by the Amendment.

Id.

The decision of the court below, *UNR Industries, Inc. v. United States*, 962 F. 2d 1013 (Fed. Cir. 1992) (*en banc*), attempts to qualify the unconditional right to just compensation by requiring that a claimant make an election between the invalidation remedy, which may only be sought in district court, and the just compensation remedy, which may only be sought in the Court of Federal Claims.

Such a reading of the Tucker Act would render it unconstitutional because it truncates the legal process to which a property owner is entitled under the fifth amendment. Fortunately, a literal reading of the Tucker Act does not contravene the Constitution because the Act limits the Court of Federal Claims' jurisdiction to suits for money damages for an unconstitutional taking only if the same "claim" (*i.e.*, for money damages for the same unconstitutional taking) is pending in another court.

ARGUMENT

I. The Decision Below Misinterprets The Meaning Of the Statute and Perverts Its Purpose

In determining the jurisdiction of the Court of Federal Claims, the court below read Section 1500 of the Tucker Act to divest the court of jurisdiction over claims "which are based on the same underlying facts" and which "are pending." The effect of this overly-broad reading of the Tucker Act is to bar the filing of different claims in both the Court of Federal Claims and a federal district court, even though such claims are based on different legal theories and seek different forms of relief. This misreading of the meaning and the purpose of the Tucker Act raises acute constitutional concerns in the area of fifth amendment litigation.

Unlike most judicial state systems, the federal system divides the jurisdiction to decide fifth amendment claims between two separate courts. 28 U.S.C. §1331 provides that all questions under the Constitution and laws of the United States be decided in federal district courts. The Tucker Act allocates all constitutional claims against the United States for money damages greater than $10,000 not founded on tort to the Court of Federal Claims. The Tucker Act provides, in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. §1491 (a)(1).

Thus, a property owner with a claim for just compensation

under the fifth amendment must decide whether he will pursue his rights in one or more federal courts because no single court has broad enough jurisdiction to grant both monetary and equitable relief. To the extent that a property owner desires to invalidate the government's action, relief which is equitable in nature, his choice of necessity will be the federal district court. On the other hand, if the property owner desires to be compensated for the amount of money lost due to the regulation or other governmental act, the claimant's remedy will lie in the Court of Federal Claims exclusively. If, however, the owner wishes to seek injunctive relief against the government action and at the same time seek compensation for the value of his property already taken, he must bring separate suits, one in the Federal District Court and the other in the Court of Federal Claims.[1]

A. The Meaning of the Statute Is to Limit the Jurisdiction of the Court of Federal Claims Only When a Claim For Money Damages is Pending In Another Court and Would Be Cognizable in the Court of Federal Claims

The meaning of Section 1500 is evident from the text which states that:

> The United States Claims Court shall not have jurisdiction of any claims for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . at the time when the cause of action

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[1] For an example of a property owner entitled to this dual remedy, see the decision on remand of *Lucas v. South Carolina Coastal Council*, No. 23342, slip op. (S. Car. S. Ct. Nov. 20, 1992), decided by this Court on June 29, 1992. (505 U.S. ___, 112 S. Ct. 2886 (1992)) On remand the South Carolina Supreme Court granted both equitable relief as to the property owner and awarded him damages for the time during which the regulation took the beneficial uses of his property in violation of the fifth amendment.

alleged in such suit or process arose . . .

28 U.S.C. §1500 (1988).

As this Court once observed upon an earlier review of Section 1500, "the words of the statute are plain, with nothing in the context to make their meaning doubtful . . ." *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924). The meaning of Section 1500 is to bar plaintiffs from bringing a claim cognizable in the Court of Federal Claims, *i.e.*, a claim for money damages against the United States, if that claim is pending in another court.

The court below perverted this language to bar claims based on the same underlying facts: "[T]hat the word 'claim' does not refer to a legal theory, contrary to appellants' arguments, but to a set of underlying facts, comports with the language and history of Section 1500." *UNR Industries, Inc. v. U.S.*, 962 F. 2d at 1023. The court below further held that all such claims were barred irrespective of when they were filed by defining "has pending" to mean at any time during the pendency of the action: "[I]f the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction" or "if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction." *Id.* at 1021.

By defining the key terms of Section 1500 in this manner, the court below was able to conclude that the tort claim filed by the Petitioner in the district court is the same as the government contract claim or the taking claim filed in the Court of Federal Claims, despite the fact that the tort claim could never have been filed in the Court of Federal Claims. In short, under the ruling below, the filing of a claim in district court for wholly different relief, premised upon an entirely different legal theory (and, which would not even be cognizable in the

Court of Federal Claims), *ipso facto* extinguishes the constitutional right to recover just compensation in the Court of Federal Claims.

The decision below further misapprehends the fact that the suit for declaratory relief is very different from the suit for just compensation. A suit for declaratory relief in district court focuses sharply upon the importance of the governmental action and the extent to which its governmental purpose is substantially advanced in the particular case, in order to arrive at a judgment as to whether this exercise of public power should be thwarted. *See, e.g., Preseault v. I.C.C.*, 494 U.S.1 (1990), where the district court upheld the exercise of governmental authority and sent the property owner to the Claims Court for just compensation.

In contrast, the takings suit in the Court of Federal Claims closely examines the economic impact of the regulation and the reasonable expectations of the owner to determine whether the concededly valid exercise of sovereign power has triggered the right to monetary relief. Thus, while both lawsuits are based upon the just compensation clause of the fifth amendment of the Constitution, a claimant may prevail in one court and lose in another, both decisions being faithful to the dictates of the Constitution. *See, e.g., Loveladies Harbor, Inc. v. Baldwin*, No. 82-1948 [22 ERC 1055] (D.N.J. Mar. 12, 1984) (unpublished), *aff'd without opinion*, 751 F. 2d 376 [22 ERC 1055] (3d Cir. 1984) (upholding the validity of the denial of the wetlands permit) and *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir.) (awarding the property owner just compensation); *see also Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160 (1985), *reversed on other grounds*, 791 F. 2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987), *on remand*, 21 Cl. Ct. 161 (1990).

B. The Purpose of Section 1500 Supports Its Meaning

The legislative purpose of Section 1500 is clear: Congress

was attempting to address problems concerning the lawsuits of claimants who had had their property, chiefly cotton, seized and used by the government for Civil War purposes. The proceeds from the sale of much of this cotton had been deposited in the federal Treasury but, after the war and upon proof of ownership and loyalty to the Union, the claimant could recover the proceeds applicable to the sale of his cotton. Prior to the days when the doctrine of *res judicata* would preclude such an anomalous result, many cotton claimants figured out a way of bettering the odds of winning their lawsuit by getting "two bites at the apple": file suit in both the Court of Claims and state or federal district courts. In the end, the government was often forced to defend the identical suit in different forums and, perhaps, to pay the same claimant twice. Section 1500 was designed to put an end to this practice:

> The object of [Section 1500] is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims.

81 Cong. Globe, 40th Cong. 2d Sess. 2769 (1868), *quoted in UNR Industries, Inc. v. United States*, 962 F. 2d at 1018.

Since that time, however, development of the modern doctrine of *res judicata* largely achieves the purposes of Section 1500 intended by its original sponsors. By shrinking the jurisdictional reach of Section 1500 the court below thwarts the purposes of the statute by actually depriving property owners of any opportunity to bring a

legitimate just compensation claim, even when that claim has never been litigated (and cannot be litigated) in any other forum.

II. The Decision Below Unconstitutionally Burdens the Claimant's Right To Seek Just Compensation

The practical impact of the opinion below is to complicate greatly the ability of a property owner to vindicate his right to just compensation for a governmental action that has caused a physical or a regulatory taking. First, he is forced to elect between declaratory and equitable relief on the one hand or recovery of the value of the property taken on the other, since the court below would deem the second claim to be the same as the first. This election is further complicated by the common government litigation strategy known as the "Tucker Act Shuffle," in which the government urges dismissal of the district court suit on the grounds that the plaintiff should seek just compensation in the Court of Federal Claims, and urging dismissal of the Court of Federal Claims suit on the grounds that the plaintiff should seek invalidation in the district court.[2]

Second, should the property owner elect to sue in district court, he runs the risk that the six-year statute of limitations

[2] For an example, *see Preseault v. I.C.C.*, 494 U.S.1 (1990). In that case, the property owner filed suit in district court challenging the validity of the National Trails System Act, 16 U.S.C. §1247 (d), as an unconstitutional taking under the fifth amendment. The Court, however, sent claimant to the Claims Court reasoning that the Tucker Act, unless specifically repealed, was available. The Court further held that invalidation could not be granted until the claimant had exhausted the Tucker Act process.

will expire during the pendency of this litigation.[3] Tucker Act. 28 U.S.C. §2501. Because the statute of limitations is an express limitation on the Tucker Act's waiver of sovereign immunity, it is jurisdictional and must be strictly construed. *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990); *Schmidt v. United States*, 3 Cl. Ct. 190, 192 (1983).

Third, should the property owner decide to forego his right to seek equitable relief against the government's physical or regulatory intrusion upon his property rights and sue for just compensation in the first instance, he runs the risk that the government will allege that his claim is unripe because the regulatory application has gone unchallenged. *See, e.g., Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160 (1985). Should the government succeed, the plaintiff may be forced to undergo years of fruitless litigation regarding the validity of the governmental action only to return to the Court of Federal Claims after an additional

[3] Judge Plager accurately describes in his dissent the uncertainty facing litigants when deciding the appropriate court in which to file their lawsuit: "[T]he Government's theory fails because it too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind §1500. The facts of the present case offer a good example. UNR had third-party complaints against the Government pending in federal district court. Unsure of whether the district court had jurisdiction, and facing a running of the statute of limitations, UNR filed the same claim in the Claims Court. By the time the Claims Court entertained and acted on the Government's §1500 motion, UNR had no earlier-filed suits pending and had yet to have its day in court. I believe the statute was not intended to operate to preclude UNR from having its day." *UNR Industries, Inc. v. U.S.*, 962 F. 2d at 1028-29 (Plager, J., dissenting).

lengthy deprivation of his property rights.[4]

Finally, the court below implies that since the district court claim and the Court of Federal Claims claim are the same, the decision of the district court may be *res judicata* as to the Court of Federal Claims action: "[I]f the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of *res judicata* and available defenses apply." *UNR Industries, Inc. v. U.S.*, 962 F. 2d at 1028-29. This conclusion is plainly wrong for it would contradict the holdings in cases such as *Nixon v. United States*, No. 92-5021 (D.C. Cir. Nov. 17, 1992); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *appeal filed*, No. 91-5050 (Fed. Cir. argued Nov. 1991); and, *Whitney Benefits, Inc. v. United States*, 962 F. 2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (Nov. 4, 1991), where the district court upheld the regulation but just compensation was nevertheless subsequently awarded.

Thus, the decision below accomplishes the result which this Court ruled unconstitutional in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987), by virtually eliminating the right to seek just compensation if the claimant first chooses to sue

[4] Such delay can in itself violate the due process clause of the fifth amendment. This Court recognized as early as 1926 that "long-continued and unreasonable delay" by an agency may quite effectively take property in violation of due process. *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587,591 (1926); *see also Armstrong v. Manzo*, 380 U.S. 545 (1965)(no lawful reason for delays not related to legitimate governmental purpose or function).

for invalidation.[5] In *First English, supra,* this Court held that the California rule which limited relief for an unconstitutional taking to invalidation of the regulation was constitutionally insufficient. This Court held that the Constitution required yet another remedy, the right to seek just compensation, in addition to the right to seek invalidation.

The *First English* Court reached this result because the remedy afforded by the Constitution for unconstitutional taking of private property is extraordinary. Representing the only express guarantee for money damages in the Constitution, this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of just compensation to which he is entitled. *First English, supra; United States v. Clarke,* 445 U.S. 253, 257 (1980).

As Justice Brennan explained in his dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981): "This Court has consistently recognized that the just compensation requirement in the fifth amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." *Id.* at 654 (emphasis in original). Justice Brennan further warned that "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments

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[5] Indeed, that the decision below eliminates the right to seek just compensation is reinforced by the government's motions to dismiss the claims for just compensation now pending in the Court of Federal Claims in *Whitney Benefits, Inc. v. United States,* 962 F. 2d 1169 (Fed. Cir.), *cert. denied,* 112 S. Ct. 406 (Nov. 4, 1991) (§1500 motion to dismiss based upon the fact that the Plaintiff had pending an action for injunction to enforce the coal exchange program under Surface Mining Control and Reclamation Act at the time the taking suit was filed) and in the Federal Circuit in *Loveladies Harbor, Inc. v. United States,* 21 Cl. Ct. 153 (1990), *appeal filed,* No. 91-5050 (Fed. Cir., argued Nov. 1991) (§1500 motion to dismiss based upon fact that at time the taking claim was filed Plaintiff also had a claim in district court challenging the validity of a §404 wetlands permit denial).

made by the legislative, executive or judicial branches." Id. at 661.

The most useful analysis of the powerful reach of the just compensation guarantee is contained in *Jacobs v. United States,* 290 U.S. 13 (1933) . In *Jacobs,* the Court reversed a lower court's decision which held that interest was not recoverable on a property owner's claim for just compensation because the statute under which suit was brought did not authorize the payment of interest. The *Jacobs* Court rejected the lower court's conclusion that one's constitutional rights to full just compensation could be limited to statutory authorization:

> This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the Untied States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution . . . The form of the remedy did not qualify the right. It rested upon the fifth amendment. Statutory recognition [of the right to interest] was not necessary. . . . The suits were . . . founded upon the Constitution of the United States . . . .

Id. at 16-17 (citations omitted).

The *Jacobs* Court recognized, as did Justice Brennan, that the right to just compensation cannot be taken away or qualified by statutory whim. Yet the ruling of the court below limits a claimant's rights to just compensation by requiring that he choose between equitable and declaratory relief and just compensation. There is no constitutional authorization for this impairment of the constitutional rights to just compensation.

Given the explicit nature of the just compensation clause remedy and the long history of this Court's decisions which have maintained the vitality of the fifth amendment against attempts to limit it by governmental legislation or other acts,

it would seem firmly established that burdening or extinguishing this right is constitutionally impermissible. Likewise, to conclude, as the court did below, that a constitutional right to just compensation can now be burdened by statute is equally impermissible.

CONCLUSION

The fifth amendment to the United States Constitution provides an explicit remedy for money damages whenever private property is taken for public use: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. v. To secure this remedy afforded by the Constitution, claimants must file an action in the Court of Federal Claims, the only court with jurisdiction to award money damages against the United States.

However, the decision below eliminates the right of a claimant to seek just compensation whenever a suit for declaratory or equitable relief is filed in the district court. Consequently, the decision below complicates even further an already complex process of litigating a takings claim by requiring the sequencing of filings and exacerbating the effect of the "Tucker Act shuffle."

The fifth amendment, however, recognizes no exception to its guarantee. Because the decision below either eliminates or excessively burdens the right to just compensation, the ruling is incorrect and must be reversed.

Respectfully submitted,

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